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PAGE

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2, 3
Statement	4
Argument	5
Conclusion	8

CITATIONS

Cases:	
Ray v. *United States*, No. 604, Oct. Term, 1936, decided April 26, 1937	6
Wall v. *Parrot Silver and Copper Co.*, 244 U. S. 407	7
St. Louis Casting Co. v. *Prendergast Construction Co.*, 260 U. S. 465	7
Statutes:	
Home Owners' Loan Act of June 13, 1933, c. 64, Sec. 8, 48 Stat. 134, as amended April 27, 1934, c. 168, Sec. 12, 48 Stat. 647 (U. S. C. Title 12, Sec. 1467)	2, 3
Miscellaneous:	
Rule IX, Rules of Practice and Procedure in Criminal Cases	5

147241—37

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 991

GERTRUDE KAY, ALIAS GERTRUDE KLEIN, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 595–599) has not yet been reported.

JURISDICTION

The judgment sought to be reviewed was entered April 12, 1937 (R. 600). The petition for a writ of certiorari was filed on May 14, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and Rule XI of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

While the petitioner seeks to present seven questions, it is believed that the determination of two questions will be dispositive of this case:

1. Whether the court below properly refused to consider the petitioner's bill of exceptions on the ground that the same was not settled and filed within the time required by Rule IX of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court.

2. Whether the indictment charging the petitioner with certain violations of Section 1467 (a) and (e) of the Home Owners' Loan Act sufficiently charged offenses against the United States, or whether, as the petitioner contends, the Home Owners' Loan Act is unconstitutional and consequently no crimes were charged by the indictment.

STATUTES INVOLVED

The Home Owners' Loan Act of June 13, 1933, c. 64, Section 8, 48 Stat. 134, as amended April 27, 1934, c. 168, Section 12, 48 Stat. 647 (U. S. C., Title 12, Section 1467 (a) and (e)) insofar as material reads as follows:

> SEC. 1467 (a). Whoever makes any statement, knowing it to be false, or whoever willfully overvalues any security, for the purpose of influencing in any way the action of the Home Owners' Loan Corporation or the Board or an association upon any application, advance, discount, purchase, or repurchase agreement, or loan, under this

chapter, or any extension thereof by renewal deferment, or action or otherwise, or the acceptance, release, or substitution of security therefor, shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both.

* * * * *

SEC. 1467 (e). No person, partnership, association, or corporation shall, directly or indirectly, solicit, contract for, charge or receive, or attempt to solicit, contract for, charge or receive any fee, charge, or other consideration from any person applying to the Corporation for a loan, whether bond or cash except ordinary fees authorized and required by the Corporation for services actually rendered for examination and perfection of title, appraisal, and like necessary services. Any person, partnership, association, or corporation violating the provisions of this subsection shall, upon conviction thereof, be fined not more than $10,000, or imprisoned not more than five years, or both.[1]

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[1] Section 8 (e) as originally enacted June 13, 1933, 48 Stat. 135, was as follows, the parts in italics being omitted from the Amendatory Acts:

> No person, partnership, association, or corporation shall make any charge *in connection with a loan by the Corporation or an exchange of bonds or cash advance under this Act* except ordinary charges authorized and required by the Corporation for services actually rendered for examination and perfecting of title, appraisal, and like necessary services. Any person, partnership, association, or corporation violating the provisions of this subsection shall, upon conviction thereof, be fined not more than $10,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioner was tried in the United States District Court for the Eastern District of New York on an indictment (R. 7–50) consisting of twenty-five counts. The judgment and sentence do not appear in the record but by reference to the "criminal docket" (R. 6) it appears that the petitioner was convicted on eight counts and was sentenced on each of seven counts to be imprisoned for a term of one year and one day, the sentences to run concurrently. Sentence on count 8 was suspended, and the petitioner was placed on probation for two years (R. 6). In counts 5 and 15 (R. 13, 31) the charge was that petitioner overstated the amounts due on mortgages upon the properties of applicants for loans for the purpose of influencing the action of the Home Owners' Loan Corporation. In counts 8, 14, 20, and 24 (R. 21, 30, 42, 48), the offense charged was that the petitioner contracted to receive fees other than those authorized or required by the Home Owners' Loan Corporation. In the remaining counts 12 and 25 (R. 27, 49) the petitioner was charged with unlawfully receiving unauthorized fees. Sentence was imposed May 29, 1936 (R. 6). Notice of appeal and assignments of error were filed June 1, 1936 (R. 535). An order extending the time in which to file a bill of exceptions was granted by the trial court June 30, 1936 (R. 6), which evidently extended such period to August 18, 1936. The bill of exceptions,

however, was not settled and filed until October —, 1936 (R. 532). The docket entries (R. 6) show that successive orders further extending the time to file the bill of exceptions were made August 18, 1936, September 8, 1936, and September 25, 1936. There also appears in the record (R. 534) an order dated October 13, 1936, extending the time for filing the bill of exceptions to October 19, 1936. Some or all of such orders were made by consent or stipulation of counsel and none was opposed by the Government (R. 533–534). The Circuit Court of Appeals refused to consider the bill of exceptions because not filed within the time required by Rule IX of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court May 7, 1934, and considered only the sufficiency of the indictment and the judgment of the lower court. The judgment of conviction was unanimously affirmed (R. 599–600).

ARGUMENT

I

Petitioner contends that the court below erred in refusing to consider her bill of exceptions. The order of June 30, 1936 (R. 6), was the only timely order extending the bill of exceptions, the orders of August 18, 1936, September 8, 1936, September 25, 1936, and October 13, 1936, all having been made after the thirty-day limit prescribed by Rule IX

had expired. As the court below observes (R. 595):

> Though this order [order of June 30, 1936] is not included in the record, it is clear from later orders which purported to further prolong the period of extension that the bill of exceptions was not filed within the time specified by the order of June 30, and the appellant does not contend otherwise. The bill of exceptions was not settled and filed until October 1936.

No application was made to the Circuit Court of Appeals to modify or amend the order of June 30, 1936. That order exhausted the power of the District Court. *Ray* v. *United States* (No. 604, October Term, 1936), decided by this Court April 26, 1937. Under the reasoning of this Court in the *Ray* case, in the absence of timely application invoking the sound discretion of the Circuit Court of Appeals to amend or modify that order, there was and could be no bill of exceptions for consideration by the Circuit Court of Appeals.

II

Petitioner contends that the sections of the Home Owners' Loan Act under which she was convicted are unconstitutional. The record filed in this Court does not disclose any objection to the indictment by way of demurrer, motion to quash, or plea in abatement. So far as the record proper discloses, the first objection to the constitutionality of the statute under which the petitioner was con-

victed was raised by amended assignments of error 1–3 (R. 539). It will also be noted from the averments of the indictment that the petitioner availed herself of the provisions of the statute which she now assails as unconstitutional. That is, she invoked the statute for purposes of profit to her business and yet seeks now to reject its penal provisions as unconstitutional. Under such circumstances it would seem that the constitutional questions sought to be raised do not merit serious consideration. Cf. *Wall* v. *Parrot Silver and Copper Co.*, 244 U. S. 407, 411–412; *St. Louis Casting Co.* v. *Prendergast Construction Co.*, 260 U. S. 469. But in any event we submit that the opinion below sufficiently disposes of the questions of constitutionality presented by the petitioner (R. 596–599).

It will be noted from the terms of the Act, U. S. C., Title 12, Section 1463 (d), that the principal activities of the Corporation in refinancing bonds, mortgages, and contracts of home owners were limited to a period of three years after June 13, 1933. The present function of the Home Owners' Loan Corporation is, therefore, limited to protecting and liquidating its investment of funds. In other words, the Home Owners' Loan Corporation having served its purpose during the financial depression, its future existence is merely for the purpose of liquidating its assets and liabilities. Except as applied to the instant case, the determination of the constitutionality of the penal

provisions of this Act involves questions of no general importance.

CONCLUSION

Petitioner had a fair trial and a careful review in the court below of the questions here presented. As the case does not present any question of present general importance and does not involve any conflict of decisions, it is respectfully submitted that the petition for a writ of certiorari should be denied.

STANLEY REED,
Solicitor General.
BRIEN MCMAHON,
Assistant Attorney General.
WILLIAM W. BARRON,
Attorney.

MAY 1937.

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